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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN JOSE DIVISION
11

12 DANIEL MATERA, as an individual, and on
behalf of the other persons similarly situated,

13 Plaintiff,

14 v.

15 GOOGLE INC.,

16 Defendant.
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Case No. 5:15-cv-04062 LHK

**REPLY IN SUPPORT OF SUPPLEMENTAL
BRIEF RE: SPOKEO, INC. V. ROBINS**

Date: June 27, 2016
Time: 1:30 p.m.
Dept.: Courtroom 8 - 4th Floor
280 S. First Street
San Jose, CA 95113

Judge: The Hon. Lucy H. Koh
Trial Date: Not yet set

1 **I. ARGUMENT**

2 Nothing in Plaintiff’s Supplemental Brief Regarding *Spokeo v. Robins* justifies his failure
3 to allege the “concrete and particularized” injury needed to support Article III standing. Because
4 *Spokeo* invalidates the theory of statutory standing on which the Complaint relies, Plaintiff is left
5 to claim that the automated processing of emails is itself a “concrete” injury—without any
6 resulting harm or even any allegations about the content or context of the communications at
7 issue. Plaintiff’s arguments fall far short of demonstrating standing, for the following reasons.

8 **A. The Automated Processing Of Email Bears No Relationship To Any Harm**
9 **Traditionally Regarded As Providing A Basis For A Lawsuit.**

10 Plaintiff claims that “Courts have long-recognized common law tort claims that mirror
11 ECPA’s and CIPA’s prohibitions against the interception of private communications without
12 consent.” (Dkt. 41 at 4.) To support this sweeping claim, Plaintiff cites a smattering of cases
13 from the 1960s and 1970s; the Restatement (Second) of Torts (1977); and an amendment to the
14 California Constitution in 1972. It is not at all clear that these authorities amount to the sort of
15 “historical practice” the Supreme Court had in mind when it advised courts to examine whether
16 an alleged “harm . . . has traditionally been regarded as providing a basis for a lawsuit in English
17 or American courts.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). Notably, the Court
18 cites *Vermont Agency of Nat. Resources v. U.S. ex. rel. Stevens*, 529 U.S. 765 (2000) as an
19 example of the appropriate analysis, in which it conducted a historical review of qui tam actions
20 from the 13th Century to the framing of the Constitution in order to determine whether a qui tam
21 relator had Article III standing. *Id.* Plaintiff offers no similar support here.¹

22 Moreover, none of Plaintiff’s authorities shows that the interception of a communication
23 alone—regardless of the nature of the communication at issue—has “traditionally been regarded
24 as providing a basis for a lawsuit.” *Id.* To the contrary, Plaintiff’s own cited authorities confirm
25 that the common law claims that he invokes apply only where a plaintiff has demonstrated “an
26 objectively reasonable expectation of seclusion or solitude” in the specific matters at issue. *See*,

27 ¹ Plaintiff’s citation to *The Right of Privacy*, an 1890 article *advocating* for the *new* recognition of
28 a right of privacy as an independent legal concept, confirms that “in very early times, the law
 gave a remedy only for *physical* interference with life and property, for trespasses *vi et armis*.”
 Samuel D. Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

1 *e.g., Shulman v. Group W Productions., Inc.*, 18 Cal. 4th 200, 232 (1998). *See also Hill v. Nat'l*
2 *Collegiate Athletic Assn.*, 7 Cal. 4th 1, 25 (1994) (“not every kind of conduct that strays from
3 social custom or implicates personal feelings gives rise to a common law cause of action for
4 invasion of privacy”); *Med. Lab. Mgmt. Consultants v. Am. Broad. Cos., Inc.*, 306 F.3d 806, 812-
5 13 (9th Cir. 2002) (recognizing that the Restatement (Second) Torts § 652B requires a “subjective
6 expectation of seclusion or solitude in the place, conversation, or matter” that is “objectively
7 reasonable”). If anything, the common law principles on which Plaintiff relies confirm that the
8 bare allegations of the Complaint are inadequate, given Plaintiff’s failure to allege any facts about
9 the contents or context of any of the emails at issue. *See In re Yahoo Mail Litig.*, 7 F. Supp. 3d
10 1016, 1040-41 (2014) (holding that a plaintiff must plead “*with specificity*” the contents of the
11 emails at issue in order to demonstrate a “legally protected privacy interest”) (italics in original).

12 Further, Plaintiff’s authorities show that common law privacy claims have addressed
13 *direct human* intrusions, not the sort of automated processing at issue here. *See Vernars v.*
14 *Young*, 539 F.2d 966, 968 (3d Cir. 1979) (involving intrusion upon seclusion claim in which
15 individual defendants opened and read plaintiff’s mail without her consent); Restatement
16 (Second) of Torts § 652B (1977) (referring to “the use of the *defendant’s senses*, with or without
17 mechanical aids, to *oversee or overhear* the plaintiff’s private affairs”) (italics added). Google’s
18 automated processing of emails to display targeted advertising involves no human review of any
19 email content and bears no resemblance to the types of direct human intrusions that have been
20 traditionally recognized by privacy torts.

21 **B. The “Judgment Of Congress” Does Not Support Standing Here.**

22 Plaintiff next claims that the U.S. and California legislatures viewed the interception of
23 communications to be an intrinsic injury in enacting EPCA and CIPA. But the isolated legislative
24 history on which Plaintiff relies consists simply of vague references to protecting privacy, without
25 further explanation. To the extent these statements show that ECPA and CIPA were intended to
26 reflect the prevailing law on privacy rights, that would support *Google’s* position, not Plaintiff’s,
27 given the long-established limitations on privacy-related torts discussed above.

28 In any case, while *Spokeo* acknowledged that the “judgment of Congress” may be relevant

1 to the standing inquiry, Plaintiff ignores the important limitations the Court placed on such
2 judgment. As the Supreme Court explains, Congress can only “elevate” injuries that are
3 “concrete, *de facto* injuries” *independently* of the statutory terms Congress enacts:

4 Congress’ role in identifying and elevating intangible harms does
5 not mean that a plaintiff automatically satisfies the injury-in-fact
6 requirement whenever a statute grants a person a statutory right and
7 purports to authorize that person to sue to vindicate that right.
Article III standing requires a concrete injury even in the context of
a statutory violation.

8 *Spokeo*, 136 S. Ct. at 1549. Thus, even if Congress intended a statute to bar certain conduct, a
9 violation of the statute does not establish standing unless the plaintiff also suffered concrete
10 injury. Plaintiff therefore cannot claim that ECPA’s legislative history allegedly evincing an
11 intent to protect the privacy of electronic communications makes *all* violations a concrete harm
under Article III.²

12 **C. Plaintiff’s Effort To Distinguish *Spokeo* As Addressing Only “Procedural”**
13 **Violations Is Unavailing.**

14 In a related argument, Plaintiff claims he need not demonstrate a “concrete” injury beyond
15 a violation of ECPA and CIPA because “the interception of email content is not some violation of
16 a mere procedural requirement . . . but rather is the injury itself.” (Dkt. 41 at 8.) But nothing in
17 *Spokeo* suggests the requirement of an independent concrete injury applies only to statutes that
18 involve “procedural requirement[s].” Rather, *Spokeo*’s holding applies *regardless* of whether a
19 plaintiff characterizes a statute as procedural or substantive in nature. 136 S. Ct. at 1549.

20 In *Spokeo*, the Court explained that Congress “sought to curb the dissemination of false
21 information by adopting procedures designed to decrease that risk.” *Id.* at 1550. As Plaintiff
22 points out, the Court held that a violation of those procedural provisions may not cause concrete
23 injury because the consumer report at issue could still be “entirely accurate.” *Id.* But the Court’s
24 analysis did not end there. The Court went on to caution that, even where a violation of FCRA’s

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26 ² Further, CIPA’s legislative history is irrelevant, as Ninth Circuit law holds that state legislatures
27 cannot manufacture Article III harm from mere statutory violations. (Google’s Supplemental
28 Brief, Dkt. 42 at 4, n.4); *see also Khan v. Children’s Nat’l Health Sys.*, No. CV TDC-15-2125,
2016 WL 2946165, at *7 (D. Md. May 19, 2016) (relying on *Spokeo* to reject the “proposition
that a state legislature . . . can manufacture Article III standing for a litigant who has not suffered
a concrete injury”).

1 procedural terms leads to the actual disclosure of false information,

2 not all inaccuracies cause harm or present any material risk of harm.
3 An example that comes readily to mind is an incorrect zip code. It
4 is difficult to imagine how the dissemination of an incorrect zip
code, without more, could work any concrete harm.

5 *Id.* Thus, even where a defendant’s violation causes the precise circumstance the statute was
6 intended to prevent—in the case of FCRA, the “dissemination of false information”—a court
7 must still assess the specific circumstances to determine if a plaintiff has suffered concrete injury.

8 Similarly here, Plaintiff cannot dispense with a showing of independent harm by simply
9 claiming that the alleged interception of email is (in his interpretation of the statutes) “the precise
10 injury that [ECPA and CIPA] seek to prevent.” (Dkt. 41 at 8.) Just as the plaintiff in *Spokeo*
11 could not rely solely on the dissemination of false information alone to demonstrate a concrete
12 injury, Plaintiff cannot simply allege an interception and claim that the purported violation of
13 ECPA and CIPA is sufficient to confer standing. In both cases, the plaintiff has allegedly
14 suffered “the precise injury” that the statutes at issue “seek to prevent.” But *Spokeo* demands
15 more. Plaintiff must allege facts demonstrating that (unlike the Supreme Court’s “zipcode”
16 example) he suffered some actual, *de facto* harm from Google’s conduct. Plaintiff asserts no such
17 facts. Indeed, the allegations here do not even approach the allegations in *Spokeo*, in which
18 Plaintiff Robins identified the particular false information that was disclosed, and further alleged
19 that this false information harmed his employment prospects as he actively sought work. *Spokeo*,
20 136 S. Ct. at 1554 (Ginsburg, J., dissenting) (acknowledging that “Spokeo’s report made him
21 appear overqualified for jobs he might have gained, expectant of a higher salary than employers
22 would be willing to pay, and less mobile because of family responsibilities”).

23 In the end, Plaintiff alleges only what *Spokeo* clarifies is not enough: that “Congress . . .
24 create[d] an express legal right prohibiting the unauthorized opening of electronic
25 communications” and that he suffered “a violation of this” right. (Dkt. 41 at 6 (internal
26 quotations omitted).)³

27 ³ Plaintiff misconstrues *Spokeo*’s citation to two cases where the Supreme Court found standing
28 based on the violation of a statute, without additional harm. Those cases involved statutes that
created governmental obligations (the disclosure of governmental records) that had no prior basis
in common law, whereas ECPA and CIPA (by Plaintiff’s characterization) codify existing law

1 **D. Plaintiff Ignores The Prevailing Law Rejecting Claims Of Article III Injury**
2 **In Similar Circumstances.**

3 Google’s Supplemental Brief summarizes the established line of authority demonstrating
4 that generalized allegations of privacy-related injuries do not support Article III standing.
5 Plaintiff seeks to avoid this line of authority by noting that some of the statutory claims in these
6 cases required a showing of economic loss as an element of the claim. (Dkt. 41 at 2 n.1.) But
7 separate and apart from whether the plaintiffs in those cases alleged all elements of their claims
8 for Rule 12(b)(6) purposes, the courts concluded that plaintiffs *also* failed to allege an injury-in-
9 fact under Article III. *See, e.g., In re iPhone Application Litig.*, No. 11-md-2250-LHK, 2011 U.S.
10 Dist. LEXIS 106865, at *16 (N.D. Cal. Sept. 20, 2011) (no standing where plaintiffs failed to
11 “identify what harm (if any) resulted from the access or tracking of their personal information”);
12 *In re Google Privacy Policy Litig.*, No. C 12-01382 PSG, 2012 U.S. Dist. LEXIS 183041, at *20
13 (N.D. Cal. Dec. 28, 2012) (no standing where plaintiffs failed to offer “a coherent and factually
14 supported theory of what [their] injury might be” under ECPA).

15 **II. CONCLUSION.**

16 Plaintiff had the opportunity to amend his Complaint in light of *Spokeo* but declined,
17 maintaining that his “allegation of interception—and nothing more” is sufficient to confer Article
18 III standing. (Dkt. 41 at 8.) *Spokeo* expressly rejected this argument. The Complaint should be
19 dismissed for failure to allege the concrete injury needed to support Article III standing.

20 Dated: June 13, 2016

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26 and must be construed in light of the limitations of that law. Moreover, the harm in these cases
27 was not merely a violation of the statute; it was the inability of individual plaintiffs to access
28 specific government records about particular political groups. *Federal Election Comm’n v. Akins*,
524 U.S. 11 (1998) (records regarding a specific lobbying group, including its members and
expenditures); *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989) (records regarding a
specific political body and its deliberations on nominees to the federal judiciary).